FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

OCT 12 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Dear Mr. Diamond:

Thank you for your letter proposing that the Commission treat investment advisers as passive investors for purposes of the mass media multiple ownership rules, and the accompanying memorandum explaining the Commission's historical perspective and treatment of passive investors. As you point out, the Commission is currently considering broadcast investment issues in MM Docket No. 92-51, including the issue of whether to expand the class of passive investors. I have therefore directed the staff to include your ex parte filing in the official record of Docket No. 92-51.

Sincerely,

Douglas W. Webbink

Douglas B. Webbink,
Chief, Policy and Rules Division
Mass Media Bureau

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July 12, 1994

VIA HAND DELIVERY

Reed Hundt, Chairman
Federal Communications Commission
Washington, DC 20554

Re: Attribution Benchmark for Investment Advisers

Dear Chairman Hundt:

I am writing on behalf of my clients, The Equitable Companies Incorporated ("Equitable"), The Equitable Life Assurance Society of the United States ("Equitable Life"), Alliance Capital Management L.P., and all of their direct and indirect subsidiaries (collectively, the "Equitable Entities") to request that the Commission increase the attribution benchmark under its mass media multiple-ownership and cross-ownership rules for interests held by major investment advisers for the benefit of third parties.

Equitable is a diversified financial services organization, shares of which are traded on the New York Stock Exchange. Through its principal subsidiaries, Equitable serves a broad spectrum of insurance, investment management and investment banking customers.

Equitable Life, a principal wholly owned subsidiary of Equitable, is a New York stock life insurance company. Alliance, an investment adviser registered under the Investment Advisers Act of 1940 (the "Advisers Act"), is a principal indirect, majority owned subsidiary of Equitable and manages the securities accounts of Equitable and Equitable Life. As an investment adviser, Alliance also manages and provides investment advisory services to investment companies and separate accounts registered under the Investment Company Act of 1940 (the "Investment Company Act"), corporate benefit plans subject to the Employee

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Retirement Income Security Act of 1974 ("ERISA"), public employee retirement systems, foundations, endowment funds, tax-exempt organizations, and other institutional investors and individuals. As of December 31, 1993, Alliance managed on a discretionary or non-discretionary basis approximately $115 billion in assets for its clients' accounts. The Equitable Entities, in the aggregate, managed approximately $185 billion in assets.

Under the FCC's mass media multiple-ownership and cross-ownership rules (see Sections 73.3555 and 76.501), the attribution benchmark 1/ for insurance companies such as Equitable Life, investment companies registered under the Investment Company Act ("1940 Act Investment Companies") such as the mutual funds managed by Alliance, and banks holding through their trust departments is 10% of the voting stock. Subject to certain exceptions not germane here, the attribution benchmark for all other individuals and entities is generally 5%.

I have enclosed a memorandum describing the treatment of investment advisers under the attribution rules. As described more fully in the memorandum, when the Commission raised the attribution benchmark for 1940 Act Investment Companies to 10% in 1984, it declined to accord investment advisers similar treatment because it was "not fully confident, based on the record now before us, that we should do so at this time." Instead, the Commission indicated it would consider higher benchmarks for investment advisers on a case by case basis.

The Equitable Entities submit that there have been significant changes in the financial services industry to warrant treating investment advisers such as Alliance the same as insurance and 1940 Act Investment Companies. In 1984, the Commission expressed the belief that investment advisers would not be prejudiced by being subject to a lower benchmark because the lower mark had been raised to 5%, and because the Commission thought advisers could simply avoid attribution "by passing through voting rights to beneficial owners...." Report and Order in Docket No. 20521, 97 F.C.C. 2d 997,1015 (1984). Such is no longer the case.

First, there has been significant growth and consolidation in the financial services industry since 1984, and the potential for aggregate investment interests exceeding 5% is substantially higher than a decade ago.

1/ I.e., the percentage interest at or above which the interest becomes subject to the rules. Such interest are sometimes referred to as "attributable interests" or "cognizable interests."

Second, contrary to the Commission's assumption a decade ago, investment advisers cannot readily avoid attribution by passing voting rights to their clients. Investment advisers are contractually delegated voting rights by most of their clients not because such rights are sought or otherwise solicited by the advisers, but rather because those clients want to delegate their voting rights. In hiring investment advisers, clients require the provision of a complete range of investment advisory services which usually includes the routine voting of shares on behalf of the client. Such clients expect that their adviser will provide this service and alleviate the perceived burden imposed by the volume of information distributed by public companies in connection with voting shares. In addition, administrators of accounts subject to ERISA can best avoid conflicts of interest and satisfy their fiduciary duties by engaging their advisers to vote such shares on behalf of the account. Indeed, many such clients, if not most, would choose to transfer business to another adviser if a particular adviser chose to pass back voting rights.

Third, the interests in publicly traded companies held by Alliance as an investment adviser, if they exceed 5% in the aggregate, are reported under Rule 13d-1(b)(1) to the SEC by Equitable on an annually-filed Schedule 13G. 2/ Pursuant to Rule 13d-1(b)(1)(i) under the Securities Exchange Act of 1934 (the "Exchange Act"), a person may not report its beneficial ownership of common stock of a publicly traded company on Schedule 13G (as opposed to the more detailed Schedule 13D) unless "such person has acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect." The Equitable Entities certify in their Schedule 13G filings that they meet this criterion, which is virtually the same as the FCC's criterion for allowing insurance companies and 1940 Act Investment Companies to use the higher attribution benchmark. See, e.g., Instruction 6 to FCC Form 323.

As an investment adviser, Alliance's business is to manage investment assets on behalf of its clients. Alliance does not "own" the securities acquired for its investment clients. All rights to dividend income, capital appreciation and other economic indicia of ownership of those securities accrue to the client and not Alliance. Moreover, while it typically has voting and disposition discretion, Alliance

2/ In addition, if Alliance's interest, as investment adviser, in a public company exceeds 10%, it reports such interest to the SEC on a Schedule 13G within 10 days following the end of the month during which its interest exceeded 10%, as required by Rule 13d-1(b)(2).

has no authority to obtain custody or possession of the funds or securities of its investment advisory clients and does not hold those securities as owner of record. Typically, no single client account will own 5% or more of an issuer's stock.

With respect to all of these accounts, including those over which Alliance has voting discretion, Alliance is subject to general fiduciary obligations to its clients under state laws and Federal statutes, such as the Advisers Act 3/, ERISA (governing U.S. corporate employee benefit plans), and the Investment Company Act (governing investment companies such as mutual funds). These laws preclude investment advisers such as Alliance from acting other than solely in the best interests of its client. As a result, its fiduciary obligations require that Alliance act in the interests of its clients rather than in its own interests when exercising any discretionary voting authority it may have over clients' securities, or when exercising any other investment decisions within its discretion with respect to those securities.

It is not normally the business of Alliance to acquire control of companies for clients or to become involved in the management of a public company. In connection with such investments on behalf of its clients, Alliance does not seek and does not have any representative on the board of directors of any such public company. Alliance also does not have any arrangement or understanding with such companies concerning the election of any such person to any of their boards of directors. The prime business of Alliance is to provide superior investment performance for its clients and thereby achieve maximum profitability through the receipt of increased advisory fees.

Finally, many of the accounts managed by Alliance are, in fact, insurance company accounts and 1940 Act Investment Companies. As described in the accompanying memorandum, when managing such an account, Alliance is subject to the same attribution benchmark as an insurance or investment company; i.e., 10%. Yet Alliance does not exercise its voting or other discretion with respect to investments made for such accounts any differently than it does for other kinds of accounts. Thus, there is no valid reason for distinguishing between such accounts in determining the appropriate benchmark.

3/ The Supreme Court has stated that the Advisers Act "reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship . . . .'" SEC v. Capital Gains Research Bureau, 375 U.S. 180, 191 (1963).

The Equitable Entities therefore propose that investment advisers who meet the following criteria be deemed to have the same attribution benchmark as insurance companies, 1940 Act Investment Companies and banks:

1. The investment adviser is registered under the Investment Advisers Act of 1940.

2. The particular investment in a publicly-traded communications company, with respect to which the higher benchmark would apply, is reported or reportable by the investment adviser on Schedule 13G. 4/

3. The investment adviser manages one or more 1940 Act Investment Companies.

4. The investment adviser (including all entities under common control) manages investments in excess of $25 billion.

5. The investment adviser does not have a representative on the board of directors of the communications company, and does not control or attempt to influence control of the communications company.

The Equitable Entities submit that such a revised benchmark for investment advisers can and should be considered and adopted in connection with the Commission's pending review of its regulations and policies affecting investment in the broadcast industry (MM Docket No. 92-51). Absent such a modification, investment advisers will be forced to restrict aggregate investment in publicly traded communications companies, which serves only to limit capital investment without any material benefit to the public interest. We believe that the Notice of Proposed Rulemaking in MM Docket No. 92-51 is sufficiently broad to permit adoption of this proposal. If the Commission disagrees, we urge the prompt issuance of a Further Notice of Proposed Rulemaking so that the proposal may be

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4/ As noted above, investments of 5 percent or more in publicly traded companies deemed to be beneficially owned by investment advisers that meet the applicable criteria are reported annually to the SEC on Schedule 13G. The SEC regulations do not require interim amendments to such annual reports for new or changed investments unless an investment exceeds 10 percent. The intent of the proposal in this letter is to subject to the higher benchmark any aggregate investment by an investment adviser, whether or not it has yet been reported on an annual or amended Schedule 13G, as long as such investment is eligible for reporting on Schedule 13G as opposed to 13D.

considered and adopted with other worthwhile changes to the attribution rules at the earliest possible date.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By ______________________
Marvin J. Diamond

Enclosure(s) Memorandum

cc: William Kennard
Roy Stewart

HOGAN & HARTSON L.L.P.

MEMORANDUM

July 12, 1994

RE: Application of FCC's Attribution Benchmarks to Investment Advisers

INTRODUCTION

This Memorandum traces the evolution of the Commission's separate consideration and treatment of certain passive investors under the multiple ownership rules and discusses the application of the passive investor attribution benchmark to investment advisers.

Although application of the passive investor benchmark to investment companies registered under the Investment Company Act of 1940 (e.g., mutual funds), bank trust departments, and insurance companies is well established, the Commission has declined to accord equal treatment to investment advisers. However, the Commission has indicated a willingness to entertain waiver requests from investment advisers regarding the appropriate attribution of their voting interests on an *ad hoc* basis.

This Memorandum examines the relevant history of the passive investor benchmark, with particular emphasis on the Commission's treatment of mutual funds. The Memorandum then analyzes one reported case in which the Commission waived its rules to grant passive investor status to an otherwise unqualifying investment adviser. Finally, the Memorandum discusses the reasons for granting passive investor status to significant investment advisers.

I. THE EVOLUTION OF THE PASSIVE INVESTOR DISTINCTION

The Commission's distinction between passive and general investors is founded on a three-part rationale. Passive entities, the Commission has concluded:

1. invest for income only;
2. are bound by fiduciary duty; and
3. are either prohibited by law or simply not in the practice of taking control or influencing the programming decisions of the companies in which they invest.

See Report and Order in Docket No. 20521, 97 F.C.C.2d 997, 1012 (1984) ("Attribution Order"). This formulation encapsulates nearly two decades of Commission findings regarding the function and nature of investment entities entitled to passive treatment for attribution purposes. The presumption reflects in part the lack of evidence of "'institutional investors using their minority interest in widely-held cable or broadcast companies to exert influence on the management of such companies.'" Id. at 1013 (footnote omitted), quoting the Commission's Report and Order in Docket No. 20520, 59 F.C.C.2d 970, 975 (1976) ("1976 Order") (unifying at five percent the attribution benchmark for investment companies, bank trust departments, and insurance companies).

A. Mutual Funds, Bank Trust Departments, and Insurance Companies

When the Commission first considered the "problem" of mutual funds, 1/ it approached the inquiry with the view that mutual funds

> may be presumed to be in a position to influence or control management of the corporations in which they are shareholders and, under the provisions of the Investment Company Act of 1940, they could exercise control if they so desired.

1968 Order, 13 F.C.C.2d at 360 (footnote omitted). Underlying this presumption was evidence that mutual funds not only vote the stock they hold, but also typically exhibit several other indicia of influence or control over their portfolio companies. 2/

Although generally supporters of management, mutual funds were occasionally found to express opposition to management, "either by direct communication or vote, on matters affecting voting, preemption, and income rights of stockholders." Id. at 361. Moreover, the Commission found that mutual fund managers are in frequent contact with portfolio company management by telephone, and through personal correspondence and private meetings. Id. Mutual funds convey advice and policy views concerning "dividend policy, new financing methods and timing, and mergers." Id. Recommendations by mutual funds

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1/ The Commission's initial inquiry regarding its treatment of passive investors was precipitated by disclosures of widespread noncompliance with the multiple ownership rules by mutual funds. See Report and Order in Docket No. 15627, 13 F.C.C.2d 357, 358 (1968) ("1968 Order").

2/ As the Commission noted, Id. at 360 n.6, the Investment Company Act of 1940 recognized among its statutory findings that mutual funds "may dominate and control or otherwise affect the policies and management of" portfolio companies. 15 U.S.C. § 80a-1(a)(3). The Act defines "control" as "the power to exercise a controlling influence over the management or policies of a company unless such power is the result of an official position with such company." 15 U.S.C. § 80a-2(a)(9).

regarding the selection of officers and directors of portfolio companies "are followed more often than not." Id. 3/

Notwithstanding these indicia of control, however, the Commission approved the separate consideration of -- and a higher attribution benchmark for -- mutual funds, "since they do not generally appear to exercise undesirable control over broadcast portfolio companies." Id. at 370 (emphasis added). 4/ Although the Commission catalogued the indicia of control by which mutual funds are generally characterized, it did not articulate the criteria by which it had evaluated them. Nevertheless, the 1968 Order implied that voting a minority stockholding, meeting with portfolio company managers, offering views on corporate policy and actions, or recommending the appointment of particular officers and directors, i.e., activities connected with general corporate affairs and not with the day-to-day operation and programming of a broadcast licensee, do not rise to the level of "undesirable control" over the licensee.

Subsequent Commission treatment of arguably passive entities sheds little light on the limits of permissible control. For example, in determining whether to accord passive status to bank trust departments, the Commission implicitly accepted the presumption that banks exercise control over broadcast

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3/ The Commission's findings regarding mutual funds were adopted from a report prepared by the Wharton School of Finance and Commerce, A Study of Mutual Funds, H.R. Rep. 2274, 87th Cong., 2d Sess. 444 (1962) ("Wharton Report").

4/ The Commission did not summarize the evidence supporting its conclusion. Interestingly, however, the Commission pointedly rejected the argument "that prospectuses of mutual funds show that they may not invest for purposes of management or control." Id. at 368. The Commission pointed out "that some prospectuses do not so state," and cited the Wharton Report as evidence that, "to some extent, mutual funds do enter into portfolio company management." Id. at 369.

portfolio companies merely by voting the stock they hold. See 1972 Order, 34 F.C.C.2d at 890. The presumption seems to have been rebutted by evidence that a bank's role as trustee is often limited contractually or by the terms of the instrument from which the trust arose, and by evidence that banks, like mutual funds, typically hold stock for investment purposes and not to control the management or policies of the company. Id.

By the time the Commission considered the status of insurance companies, however, the operative presumption appears to have shifted toward passivity. Thus, the Commission accepted without further comment the conclusory argument that "investments by insurance companies are passive because there is no intent to exercise control over management of the broadcast licensee." 1976 Order, 59 F.C.C.2d at 973. 5/

B. Current Application of the Passive Investor Benchmark

The application of the higher benchmark now presumes "that the party using it maintains a truly passive role in the affairs of the licensee." Attribution Order, 97 F.C.C.2d at 1013. An acceptably passive role is characterized by

> refraining from contact or communication with the licensee on any matters pertaining to the operation of its stations and no representation on the board or among officers of the licensee corporation by persons professionally or otherwise associated with the institution.

Id. at 1013-14 (emphasis added).

5/ However, the Commission here seems to have been preoccupied by competitive considerations, i.e., its desire to treat insurance companies "in the same manner as banks and investment companies," thereby preventing the latter entities from gaining "a competitive advantage over insurance companies by virtue of their higher attribution benchmark." Id. at 973. For the same reason the Commission declined to raise the attribution benchmark for investment companies to ten percent at this time. Id. at 975.

The language of the Attribution Order is in some respects a variation on, if not an elucidation of, the "undesirable control" theme sounded in the 1968 Order. Significantly, the Attribution Order by its terms prohibits only communication concerning day-to-day operational matters, and not the sorts of contacts concerning structural corporate issues and policy enumerated in the 1968 Order. In this respect, the "truly passive" standard of the Attribution Order is not inconsistent with the indicia of control implicitly recognized as permissible in its predecessor. 6/

Indeed, although the Commission now accepts a presumption of passivity for investment companies, banks, and insurance companies, it has consistently recognized that even an avowedly passive investor may exercise some influence or control over a broadcast licensee simply by virtue of its ownership of voting stock. The Commission early on endorsed the view that "even by voting their proxies in support of portfolio company management (mutual funds) are entering into management." 1968 Order, 13 F.C.C.2d at 369. And the Commission has demonstrated a continuing concern with the influence a purportedly passive investor may wield "by buying, selling, and voting large blocks of stock." 1976 Order, 59 F.C.C.2d at 98.

However, the Commission appears to be concerned with a level of control or influence greater than that which may be exercised merely by voting or transferring even substantial blocks of shares. Indeed, the Commissions ultimate

6/ Further support for this argument is provided by the Second Order in Docket No. 20521, 58 R.R.2d 604, 619 (1985) ("Reconsideration Order"), discussing the criteria for exemption from attribution of limited partnership interests. There the Commission noted that the requirement that exempt limited partners refrain from "communicating with the licensee . . . on matters pertaining to the day-to-day operations of its business" is "generally comparable to the requirement that we imposed upon persons taking advantage of our 'passive investor' benchmark." Id. at 619 n.63.

decision to raise the passive investor attribution benchmark from five to ten percent resulted from its implicit recognition that trading minority blocks of stock of this size, without more, is not likely to yield meaningful influence over corporate affairs or management. 7/

This reasoning appears to be an outgrowth of the Commission's view that the attribution benchmarks are essentially qualitative in nature, i.e., they are an indicator of the ability to control or influence a licensee's affairs, rather than simply an arbitrary level of quantitative ownership. In other words, the Commission has concluded that an institutional investor's ownership interest of less than ten percent does not confer a meaningful degree of even potential control or influence. See 1968 Order, 13 F.C.C.2d at 370 (although benchmark "is couched in terms of ownership of voting stock, the importance of such ownership is that it translates into potential ability to control a broadcasting corporation").

This reasoning is also consistent with the functional analysis the Commission employs in making passive investor attribution determinations. 8/

7/ The decision was predicated, in part, on a stock distribution survey which disclosed that only

> a block of 10% or more of voting stock approximates that level in most broadcast corporations that could often result in [an effect on corporate management), even if inadvertent and unintended.

Id. at 1013. The Commission previously had suggested that, where ownership of non-voting stock included convertible voting rights, the "dumping" of such stock could affect the value of common voting stock, thereby conferring some power on its holder. See Evening Star Broadcasting Co., 67 F.C.C.2d 318, 323 (1978) ("Evening Star"). However, the Commission subsequently dismissed that reservation as merely a "possible phenomenon" that had never been demonstrated. See Attribution Order, 97 F.C.C.2d at 1021.

8/ The Commission early on reasoned that:

Thus, for example, the Commission has indicated a willingness to look behind the attribution benchmark when it suspects an investor may be exercising de facto control over a licensee:

> [S)hould a mutual fund (as well as any other holder of broadcast voting stock) exercise control over management of a broadcast station the interests of the fund so exercised will be taken into consideration in applying the multiple ownership rules even though the holding might be less than [the then-current passive investor benchmark).

1968 Order, 13 F.C.C.2d at 371.

Conversely, this functional analysis persuaded the Commission to raise and equalize the benchmark for investment companies, banks, and insurance companies in order

> to treat equally these three types of institutional investors, all of which play similar fiduciary roles in investing and managing the funds of others and which compete for the same type of investments.

1977 Order, 65 F.C.C.2d at 337 (emphasis added). 9/

> Before discussing any suggested modifications of the rules . . ., it is necessary to examine the way in which the various investment entities function, for their manner of functioning will determine whether, insofar as such entities are concerned, the multiple ownership rules should be modified, or could be modified without making impossible the achievement of the ends at which the rules aim.

1968 Order, 13 F.C.C.2d at 359. More recently, the Commission decreed that an investment entity "should be accorded attribution status based on its specific function and nature." Attribution Order, 97 F.C.C.2d at 1014.

9/ The Commission has elsewhere recognized the need to treat similar investment entities equally. See, e.g., College Retirement Equities Fund, 35 F.C.C.2d 885 (1972) ("CREF") (treating pension fund as equivalent to mutual

II. INVESTMENT ADVISERS AND THE PASSIVE INVESTOR BENCHMARK

In the Attribution Order, the Commission defined an investment adviser as

> an entity or individual that advises others, for a fee, of the value of securities and the advisability of securities investments. 15 U.S.C. § 80b-2(a)(11). An investment adviser, commonly a "broker dealer" (15 U.S.C. § 78o), will often directly invest for its clients, using its own discretion within whatever guidelines the client may provide.

97 F.C.C.2d at 1014 n.39. 10/ However, after positing that "similar institutions should be treated similarly," Attribution Order, 97 F.C.C.2d at 1014, the Commission declined to accord passive investor status to investment advisers. Id. at 1015. The Commission acknowledged that "some justification may exist to warrant according investment advisers passive status," but was not "fully confident" to do so "at this time." Id. The Commission also expressed the belief that investment advisers would not be prejudiced by that decision because they could "ease[ly]" avoid attribution by "passing through voting rights to beneficial owners...." Id.

Alternatively, the Commission indicated its willingness to consider waiver requests from investment advisers regarding the appropriate attribution of their voting interests. See Attribution Order, 97 F.C.C.2d at 1015. Subsequently, however, the Commission recognized one situation in which an investment adviser will presumptively be entitled to attribution at the ten percent benchmark. This

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fund "since it has many of the indicia of a mutual fund"); New York State Teachers' Retirement System, 52 R.R.2d 1695 (1983) (citing CREF in according passive status to state pension fund).

10/ The Commission's definition paraphrased the definition contained in the Investment Advisers Act of 1940.

exemption is of particular significance -- factually and legally -- to the arguments in support of a general increase in the benchmark.

A. Passive Interests Managed By Investment advisers Are Subject to the Ten Percent Benchmark

Upon reconsideration of the Attribution Order, the Commission clarified the attribution status of general investors, i.e., those not included within the definition of a "passive investor," holding interests in entities qualifying for passive investor status. The Commission concluded that, under those circumstances, the status of the passive entity would be "attributed up" to the general, or non-passive, investor. See Reconsideration Order, 58 R.R.2d at 622 n.81. Thus, for example, where an investment adviser manages a mutual fund or insurance company account, it will itself be subject to the ten percent benchmark. This is so, the Commission reasoned, because any interest in a broadcast licensee acquired in this manner is "wholly the result of the ownership of an entity" -- the mutual fund, for example -- "which qualifies for 'passive investor' treatment." Id. The Commission concluded that "[a) contrary rule would produce the anomalous result of having the owner of a more remote interest being subject to a more rigorous standard than the owner of a direct interest." Id. Thus, where an investment adviser manages mutual funds or other "passive" accounts, they are already treated as passive investors. Under those circumstances, they are subject to the ten percent benchmark.

B. The Stoner Precedent

The breadth of the "passive interest" exception as it applies to investment advisers supports a general grant of passive status even where the anomaly noted in the Reconsideration Order is not at issue. Particularly where a substantial fraction of the funds managed by an investment adviser reside in mutual funds and other entities entitled to passive attribution status, the advisor can be seen to play a fiduciary role in investing and managing the funds of others similar to that played by the passive entities themselves. Significantly, the Commission has previously recognized the close relationship and similarities between an investment adviser and other passive investors.

This recognition was the basis of the Commission's decision to accord passive status to an investment adviser in Stoner Broadcasting Systems, Inc., 74 F.C.C.2d 349 (1979) ("Stoner"). Although the Commission declined to accept Stoner as support for "a general characterization of investment advisers as passive entities for attribution purposes," Attribution Order, 97 F.C.C.2d at 1015 n.41, it made factual findings and employed functional criteria that are essential to a determination of the passive attribution status of Equitable's investment adviser subsidiaries.

In Stoner, the Commission granted passive status to an investment adviser that, as the result of its management of several independent employee benefit plans, for which various banks served as fund trustees, held broadcast company voting stock in amounts exceeding the general investor benchmark. As an initial matter, the Commission took note of the highly circumscribed nature of the advisor's discretionary role:

> Under the typical advising contracts, First Manhattan is given investment discretion subject to revocation upon five days' written notice. Such investment discretion carries with it the concomitant right to direct the voting of the stock by the fund trustee (the bank). This exercise of voting power is purely incidental to First Manhattan's investment advisery function, and flows from the trust agreement with the bank trustee.

Id.

Furthermore, the Commission rejected the view that investment advisers consider voting rights "important." Stoner, 74 F.C.C.2d at 551 n.7. The Commission concluded that, quite to the contrary, investment advisers' "insistence on voting rights stems from fiduciary and statutory obligations to the beneficial holder." Id. The Commission implicitly acknowledged that, where an advisor is managing investments pursuant to contract, it may appropriately be considered at least as passive as other passive investors which, as in the case of mutual funds, invest on their own account. 11/

The Commission's ruling in Stoner ultimately was based on its consideration of the following six "facets of organization," Id. at 553:

-- the investment adviser performed investment advisery services not differing in materiality or effect from that of the manager of a pension fund previously granted a waiver;

-- the advisor's services were rendered to tax exempt employee benefit plans or pension programs;

-- the advisor was solely interested in passive investment;

-- the advisor had characteristics in common with mutual funds;

-- the advisor's investment plans were tax exempt and intended solely to result in dividend or capital gains for its clients; and

-- the advisor had a fiduciary obligation and was subject to strict government regulation under the Investment Advisers Act of 1940 and other laws.

11/ The Commission noted this distinction in the Attribution Order, 97 F.C.C.2d at 1014 n.39. After noting that an investment advisor typically invests for its clients pursuant to guidelines that they provide, the Commission pointed out that "an investment company purchases stock in itself and in turn sells stock in the investment company" (emphasis added).

Although the Commission's inquiry was highly factitious, the "facets" it considered decisionally significant reveal a concern with several underlying issues that will be significant in developing Equitable's factual record.

First, the Commission examined the nature and extent of the financial services provided by the investment adviser and the financial objectives of its investment plans. The Commission also looked to evidence of the advisor's "intent," i.e., whether it was passive, investing for income only. The Commission considered the regulatory context in which the advisor functioned. Finally, it compared the investment adviser, in function and organization, to mutual funds.

The comparison to mutual funds points up a particularly significant aspect of the lineage of the Stoner analysis. In Stoner, the Commission measured the investment adviser's organization and function against criteria it had developed previously in CREF, where the Commission granted passive status to a pension fund. 12/ The analytical model for CREF, in turn, was the Commission's 1968 Order according passive status to mutual funds. See CREF, 35 F.C.C.2d at 885. The Commission, in essence, accorded passive status to the pension fund by equating it with a mutual fund, in a ruling reflecting the Commission's findings that the fund "has many of the indicia of a mutual fund and . . . does not invest for purposes of control." Id. (emphasis added). See also, New York State Teachers' Retirement System, 52 R.R.2d 1695 (1983) (characterizing the pension fund in CREF as passive because it had "many of the characteristics of investment companies that are already subject to this higher [passive investor] benchmark").

Significantly, in neither CREF nor Stoner did the Commission insist on a perfect identity between the characteristics of the entity under review and

12/ CREF, like Stoner, was ultimately limited to its facts in the Attribution Order, 97 F.C.C.2d at 1016 n.44.

those of the "baseline" passive entity. For example, in CREF, a pension fund was deemed passive because it had "many" of the indicia of a mutual fund; later, in Stoner, an investment adviser was granted passive status because it "appear[ed) to meet the CREF precedent in certain respects." Stoner, 74 F.C.C.2d at 553.